REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CIVIL CASE NO. 1285 OF 1997

KAIHU KARUGO……………………………………...1ST PLAINTIFF

WAMBUGU NJURU……………………………………. 2ND PLAINTIFF

NGUGI NGANGA……………………………………..3RD PLAINTIFF

NYAMU MUCHUNU……………………………………4TH PLAINTIFF

V E R S U S

JOSEPH KAMAU NJIGUA………………………………..DEFENDANT

R U L I N G

This is an application under Order XXXIX Rule 2(1) and (2) of the Civil Procedure Rules (hereinafter referred to as "the Rules"). In it, the Plaintiffs seek to restrain the Defendant from collecting rents in respect of L.R. No. 209/231/5, Bengal Road, Nairobi (hereinafter referred to as "the Bengal Road Property") and L.R. No. 36/11/157, Eastleigh Section II, Nairobi (hereinafter referred to as "the Eastleigh Property") and from carrying on the business of "boarding and lodging" on the Eastleigh property.

The matters leading to this application are as follows. On 16th October, 1969, a certificate of Registration under section 14 of the Registration of Business Names Act (Cap. 499) was issued to the following persons:-

1. Kahoreria Thuita;
2. Joseph Kamau Njigua (the Defendant herein);
3. Kaihu Karugo (the 1st Plaintiff herein);
4. Wambugu Njuru (the 2nd Plaintiff herein);
5. Mwangi Kimani;
6. Nyamu Muchunu (the 4th Plaintiff herein); and
7. Ngugi Nganga (the 3rd Plaintiff herein).

The certificate was in respect of a partnership business known as "Kenda Boarding and Lodging" at Plot No. 231/10, L.R. No. 209, Bengal Road Nairobi. Except for Nyamu Muchunu, those persons to whom the Certificate of Registration was issued as mentioned above with another Ruguru Mwangi are also tenants in common in equal shares of the Eastleigh property. The Plaintiffs' case is that the Defendant has been collecting rent in respect of the partnership business since 1995 without accounting therefor nor banking the same into the partnership account. Miss Muendo for the Plaintiffs stated before me in support of this application that her clients were willing to have the disputed rents collected by an impartial person.

Mr. Kibara for the Defendants, on the other hand, made legal arguments that the application was bad in law. He stated that the Plaintiffs had not complied with Order I rule 8 and Order L rules 7 and 15(2). He also stated that the third Plaintiff was dead and that no step had been taken to amend the pleadings as required. He argued that the application as drafted sought a permanent injunction. As to the factual dispute, he argued that funds had been collected and distributed. This matter is the dispute for trial and I am carefully warned not to determine the suit at this interlocutory stage. It is not sufficiently clear at this stage whether the Defendant has indeed "collected and distributed" the partnership funds in his control. It cannot be so when he evasively disputes the existence of the partnership at some points yet admitting its existence at others. However, before I determine this application on its merit, I would like first to consider the legal arguments made for the Defendant and referred to earlier.

As to Order 1 Rule 8, Mr. Kibara argued that no notice as required had been issued. The suit in this case is said to have been brought on behalf of the Plaintiffs and on behalf of other partners of the firm. As no notice has been issued to the other partners, the suit in respect of those others cannot be maintained. The Court of Appeal in **Kenduiwo A. Marisin & 6 Others v. Samuel Kipsige Arap Soi (Suing on behalf of Kilanda Village Group)** Civil Appeal No. 140 of 1996 said as follows on this question:

"At the outset, it would appear from the record of appeal that the respondent did not comply with the relevant provisions of Order I Rules 8 and 22 of the Civil Procedure Rules regarding representative suits. He had, therefore, no capacity to bring the representative suits…….He could only have proceeded in that suit on his own behalf and not on behalf of the others."

The statement in that decision is clear beyond peradventure. Whereas the Plaintiffs in this suit have no capacity, having failed to comply with the Rules as to the issuing of the required notice, to maintain this action on behalf of the other partners, the suit can proceed as far as it concerns them alone.

Next I will deal with Mr. Kibara's objection as concerns noncompliance with Order L Rules 7 and 15(2) of the Rules. The relevant part of Order L Rule 7 of the Rules provides that every summons shall state in general terms the grounds of the application being made. This was not done in this case. The relevant part of Order L Rule 15(2) of the Rules, on the other had, provides that every summons shall bear at the foot the words:-

"If any party served does not appear at the time and place above mentioned such order will be made and proceedings taken as the Court may think just and expedient."

Again the Chamber Summons in this case did not comply with that requirement. Both these are procedural defects. What have our Courts said on this matter? In **Castelino v. Rodrigues** [1972] E.A. 223 the Court of Appeal for East Africa held that irregularities of form may be ignored or cured by amendment unless they are prejudicial to the innocent party. The Court in that case said as follows at page 224:-

"The Respondent could not possibly h ave been prejudiced by the form of notice, since he had before him all the grounds on which leave to defend was being sought. In these matters of procedural irregularities, it is the question of prejudice that is all important. If there is no possib le prejudice, the wide power to allow amendment….should normally be exercised."

In **Unga Ltd v. Amos Kinuthia & Others** Civil Appeal No. 175 of 1997 the Court of Appeal held that a deviation from forms is not fatal if the deviation does not affect the substance of what is sought and if it is not calculated to mislead. In that case, the Court disapproved its earlier dictum in **National Bank of Kenya Ltd v. Ndung'u Njau** Civil Appeal No. 211 of 1996 in which it had been said that failure to state the grounds of an application was "a fatal omission." For further illustration on this point, see **Echaria v. Echaria** Civil Appeal No. 247 of 1997; **Karatina Garments Ltd. v. David Nyandarua** Civil Appeal No. 6 of 1976; and Moses Ndoso v. Ferdinard Mwangombe Civil Appeal No.145 of 1988 (particularly the decision of APALOO, J.A. (as he then was)). Mr. Kibara has not shown what prejudice will be caused to his client by the procedural slips complained of and it would not achieve any justice for the parties to accede to those objections.

As to the death of one of the Plaintiffs, Miss Mwendo's reply is clear. Under Order XXIII Rule 2 of the Rules the death of one of the Plaintiffs does not cause this action to abate. That rule provides as follows:-

"(Order XXIII r.) 2. Wh ere there are more plaintiffs or defendants than one, and any one of them dies, and where the cause of action survives or continues to the surviving plaintiff or plaintiffs alone or against the surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants."

Finally, I did not understand Mr. Kibara's argument that the "order as drafted seeks a permanent injunction." That argument is unnecessary. The heading under Order XXXIX of the Rules is quite clear that applications under that Order are for temporary injunctions and any orders made thereunder are interlocutory. If the application is as Mr. Kibara complained, that should not be matter to detract this Court from dealing with the application before it. That may be another procedural default which as already seen cannot render the application fatally defective. That should be enough for the legal arguments. Now going to the substance of the application before the Court, I will say as follows.

The jurisdiction of this Court to grant interlocutory injunctions is well governed by the now famous case of **Giella v. Cassman Brown & Co. Ltd [**1973] E.A. 358. The principles enunciated in that case are as follows:-

a) That the applicant must show that he has a prima facie case with reasonable probability of success;

b) That the applicant must show that he stands to suffer irreparable damage that cannot be compensated by an award of damages if his application is denied; and

c) That if the Court is in doubt, it shall decide the application on a balance of convenience.

I have already stated previously that the Defendant is evasive in regard to the matters before the Court. In that case, I am satisfied that the Plaintiffs have a prima facie case with reasonable chances of success and on that basis alone I am inclined to determine this application in their favour at least as it concerns the collection of the rents of the partnership property. As the Plaintiffs are willing, I order that the rents so collected be deposited in an account with a reputable bank in the joint names of the Advocates of the parties.

As to prayer number 1(b) of the Application, I was not satisfied that the Defendant was carrying on an unlawful business and I am carefully warned not to issue any orders against him as prayed.

In the main the Plaintiffs' application succeeds as ordered above. The costs of the application shall be in the cause.

DATED and DELIVERED at NAIROBI this 24th day of October,

2001.

ALNASHIR VISRAM

JUDGE